JURISPRUDENCE AND LEGAL EDUCATION.

An English visitor to America who is interested in legal education will be struck by the indifference to "Jurisprudence" which is displayed by many American law schools. If he is ignorant of the reputation which these schools have won for themselves in the academic world, he will be tempted to dismiss the matter with a petulant "So much the worse for legal education in America!" But if such ignorance is denied him, he will naturally ponder over the disturbing fact that some of the best law schools of the world attach little or no importance to a subject to which English practice has given great prominence.

It would be easy to suggest certain explanations of the fact just stated which would not be very flattering to teachers of law, either in the old world or in the new. In deference to a scriptural injunction as to the preliminary duty of removing beams from one's own eye, I venture to suggest that Jurisprudence as taught in England has not commanded the respect to which it would otherwise have been entitled because it has failed to keep pace with modern progress in educational theory. English law schools have too submissively accepted the domination of a traditional interpretation. In the present article I propose to summarize what appear to me to be the most important defects of that interpretation. The reader will of course understand that I mean by Jurisprudence, not any or every possible science of the law, but that particular science which claims to form a distinct subject in a scheme of legal education.

The first and most obvious defect is the absence of any clear conception of the purposes which Jurisprudence should serve. A treatise on legal science may be learned and original, it may advance human knowledge and even bear the impress of genius, and yet fail in the one supreme test of being practically useful to law students. English Jurisprudence, while professing to serve practical ends, has shown no clear apprehension of the nature of those ends. The utility of the subject, instead of controlling its interpretation from the outset, seems rather to have been an afterthought. A striking illustration may be found in the number of treatises which, failing to recognize that the needs of a law student must vary according to the stage of his apprenticeship, discuss law from points of view which are appropriate to very different periods of

mental development. A course in methodology or in elementary law may serve useful purposes as an introduction to legal study, but would be superfluous for the advanced student. On the other hand, the ultimate analysis of legal conceptions, or discussions as to the nature and end of law, are matters which, though necessarily included in a science of law, demand on the part of the student a certain maturity of mental development and a considerable knowledge of legal rules and principles.

A second defect of English Jurisprudence, though less fundamental, has had unfortunate consequences. I allude to the undue importance which has been attached to the theory of legal classification. The defect is the more serious because, at most universities, Jurisprudence is taken during the earlier years of the student's course. The student is introduced to controversies respecting some of the most difficult questions of legal classification before he has become acquainted with the material to be classified. But even if Jurisprudence were taken when it *should* be taken, and concluded the student's course instead of serving as an introduction to it, the statement would still be true that the importance of a theory of legal classification has been overestimated. Such a theory more nearly concerns the writer of legal text books or the compiler of national codes than the student who desires to complete his legal education by a comprehensive view of law. What the student really needs is not so much a classification of legal rules, as an interpretation of law as a whole—viewed in relation to the purposes which it serves, the fundamental conceptions which it employs, and the historical conditions and agencies which have determined its evolution.

A third defect in the traditional conception and treatment of Jurisprudence has been the result of an excessive regard to technique. Law, like every other subject, can be regarded from many points of view, but the value and truth of the results obtained from any one point of view are necessarily conditional upon a certain co-operation between investigators in very different fields and with widely different outlooks. Neither in Jurisprudence nor in politics is a "splendid isolation" to be regarded as a desirable ideal. The jurist, political philosopher, statesman or sociologist, must each remember the eternal necessity for revising their conclusions in the light afforded by independent investigators in other fields than that in which they are severally most concerned. In Jurisprudence, the result of ignoring this necessity has told for

a narrow and technical view of the nature of law as if it were a sort of water-tight compartment. After all, as one writer on Jurisprudence well says, "Law is the reflection and image of the outer world." [1] It is a part of the work of the jurist to make that reflection and image true. The scientifically minded lawyer must fight his way beyond the phrases and forms of the law to the deep realities of social life. He must endeavor so to shape his legal theory as to make it as consonant as may be with things as they are. He must, for example, rise superior to the pedantry which represents the visible rulers as the absolute source of sovereignty and law. Nor need he, because law and ethics are distinguishable, lose sight of the important relations between them. Until he recognizes that law is a practical application of morality, and until this recognition has borne fruit in a broad and rational interpretation of law as revealing an ever growing consciousness of right, his legal science is condemned to artificiality and distortion. The logic of the law obscures its spirit.

A fourth defect in the traditional interpretation of Jurisprudence in England may be traced to the influences of continental theories of Natural Law. Austin, while he repudiated those theories, did not escape from their influence. He substituted for the conception of an ideal code, presumed to be universally applicable, the conception of a "General Jurisprudence" derived from the comparison of modern legal systems. In so far as this latter conception implied a preference for *a posteriori* over *a priori* methods, it marked a distinct advance upon continental theory. But if Austin had enjoyed the privilege of living later in the nineteenth century, he would have taken a further step, and recognised the element of fiction which exists in the theory of generality as certainly as it existed in the theory of universality. As I have remarked elsewhere, a system of law is the resultant of many forces, of the particular social and economic conditions, of the character and history of a people. It is a concrete expression of man's endeavor to realise the useful and the just under the conditions of a particular environment. It varies according to circumstances of time and race. The legal rules of one country are not those of another. But the principles which legal science should illumine and develop are derived from legal rules. If those rules differ in different nationalities, it is difficult to see how the principles can be identical or common. When we have elimin-

[1] Salmond, *Jurisprudence* (1st Ed.), page 663.

ated all differences, the residuum will be a very inadequate explanation or representation of any of the particular systems which have been made the subject of analysis. The *ethos,* the spirit of each, will have escaped us. "The revived study of Germanic law in Germany, which was just beginning in Austin's day," writes Professor Maitland, "seems to be showing that the scheme of Roman Jurisprudence is not the scheme into which English law will run without distortion."[2]

If the foregoing arguments be sound, the Jurisprudence of the future will be treated with a special regard to its practical function as a means of completing a course of legal education. So treated, the science will aim at leading the law student from the particular to the general, from the study of particular branches of law to a comprehensive survey of the legal system as a whole, its fundamental conceptions, its social and economic purposes, and its historical causes. Since the science is to throw light upon a particular system of law, it will be national and will be developed by *a posteriori* analysis of the present and the past; since it is to serve the interests of students it will be conceived, not in the spirit of research merely, but also in the spirit of the teacher who,—not unmindful of the fact that the truths which a student is led to discover for himself are of infinitely greater value than the knowledge which he passively accepts at the hands of others,—seeks to arouse intellectual curiosity, rather than to stifle it by a premature statement of the fundamental truths he wishes to inculcate.

The investigator who ventures to make suggestions towards a reconstruction of any subject, may seem very lacking in gratitude to those but for whose efforts in the past he could have had no suggestions to offer. He is so anxious to see certain reforms effected, so concerned to emphasize what he believes to be the defects of a traditional treatment, that he is apt to suggest the mental attitude of the Eton tutor of whom it was said, "First he told you what Plato thought, then what Aristotle thought, and then he gave you the facts." Such an attitude is more open to objection than the genial optimism of the individual who fails to see that reconstruction in every subject of human enquiry must be eternally going on if there is to be progress in human thought. If the Jurisprudence of the future is to be wholly worthy

[2]Encyclopedia Britannica, XXVII, 253. Quoted, Jethro Brown, *The Austinian Theory of Law,* page 364.

of the student's regard, though it will combine old elements in a new way and with a new emphasis on certain aspects as the result of a more clear and consistent appreciation of practical ends, it must be based in the main upon the labors of great investigators of the past and present. Some of those investigators have held high office on the Bench, and their work must be sought at large in the law reports. The work of others may be found in learned treatises whose established reputation in Europe and America is such as to make any praise of them almost a presumption. I should like, however, to allow myself the luxury of a brief reference to three works which appear to me to have a special claim upon the student's attention. Ihering's *"Der Zweck im Recht"* is not only a profound work of genius but is also a work which could not fail to prove of the utmost practical value to law students. It is a matter for great regret that no English translator has been found to make the work more generally available for English students. Professor Dicey's *"Law and Opinion in England,"* perhaps the most important contribution to English Jurisprudence which has been made in recent times, should be read by every serious student of English law. Austin's *Jurisprudence,* which has been more responsible than any other single work for the defects to which reference has been made in the present article, though it can no longer claim to be read in its entirety, cannot be altogether neglected. And this is so, at any rate, as regards Austin's analysis of law and sovereignty, partly because that analysis was the work of an author who enjoyed in a very exceptional degree the power of making a student think, and partly because later work is so often a mere criticism or re-statement of Austin's conclusions.

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